Notes

Mandamus As A Means of Federal Interlocutory Review

Interlocutory orders generally may be defined as orders that do not decide the merits of an action, but instead decide some non-dispositive issue or matter. They have also been described as "orders that merge into the final judgment and that can be effectively reviewed on the appeal of a subsequent order . . . [or] orders that may be subject to a later reconsideration and correction by the trial court."[1] Traditionally, appeals taken from such orders before entry of a final judgment in the action have not been favored by the federal courts since a proliferation of interlocutory appeals would lead to piecemeal litigation and delay. In most cases, the appeal of issues determined by a district court during the pendency of an action must be reserved until after final judgment has been rendered, at which time all appealable issues can be consolidated.

Under some circumstances, however, an interlocutory appeal may be desirable to protect a valuable right of a party, to expedite an action, or to avoid the delay and expense of an unnecessary trial. Prior to 1958, there were only two significant means by which interlocutory review could be obtained. The first was what is today section 1292(a) of the Judicial Code, which permits appeals of certain types of orders specified in the statute, such as orders involving receiverships or injunctions.[2] The other important method was to petition a court of appeals for a prerogative writ,[3] typically the writ of mandamus.[4] In the Interlocutory Appeals Act of 1958,[5] Congress added subsection (b) to section 1292. This provision granted discretionary authority to the federal courts to entertain interlocutory appeals from civil orders that involve a "controlling question of law as to which there is substantial ground for difference of opinion," the resolution of which

1. Comment, *Requiem for the Final Judgment Rule*, 45 TEX. L. REV. 292, 296 (1966).

2. 28 U.S.C. § 1292(a) (1970).

3. 28 U.S.C. § 1651 (1970).

4. The common law writ of mandamus

> issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.

BLACK'S LAW DICTIONARY 1113 (4th ed. rev. 1968).

The writ of prohibition, the counterpart of mandamus, is also used. The federal courts have not been overly concerned with the distinction between the two, *see, e.g.*, *Ex parte* Simons, 247 U.S. 231, 239-40 (1918), and usually petitioners simply request relief "in the nature of" mandamus or prohibition. For the sake of convenience, mandamus will be used throughout this Note to refer to both types of prerogative writs.

5. Act of Sept. 2, 1958, Pub. L. No. 85-919, 72 Stat. 1770, *amending* 28 U.S.C. § 1292 (1952).

"may materially advance the ultimate termination of the litigation."[6] This discretionary power of review has been used sparingly by the federal courts[7] and thus has not eliminated the authority or the need for occasional review by mandamus.

This Note will examine the present utility of mandamus as an independent means of obtaining review of federal district court interlocutory orders.[8] Although an occasional criminal case will be mentioned, the discussion primarily will concern civil actions.[9] The first section will examine the policy behind interlocutory review in general and the limited availability of this type of review under present federal statutes and case law. The role of mandamus in federal appellate practice will then be considered in relation to that general policy and use. A principal concern here is the delineation of circumstances in which mandamus may be used to review an interlocutory order when other means are unavailable. To illustrate these circumstances, three types of interlocutory orders will be discussed in section III. The conclusion reached in this Note is that although the appellate courts vary in the extent to which they will permit mandamus review, this type of review is generally limited to extraordinary cases involving an alleged abuse of discretion or usurpation of power by a district court.

I. INTERLOCUTORY REVIEW IN THE FEDERAL COURTS: AN OVERVIEW

A. *The Problem*

The federal court system has long operated with a policy that appeals from district court orders generally should not be entertained during the pendency of an action, but rather should be held in abeyance until the district court has disposed of all the issues before it and has rendered a final judgment.[10] This "final judgment rule" originated in the Judiciary Act of 1789[11] and is found today in section 1291 of the Judicial Code, which provides: "The courts of appeals shall

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6. 28 U.S.C. § 1292(b) (1970).

7. C. WRIGHT, LAW OF FEDERAL COURTS 518-19 (3d ed. 1976); Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 109 (1975).

8. This Note is concerned only with mandamus review by the federal courts of appeals. Direct review of district court orders by the Supreme Court may be accomplished pursuant to the Court's mandamus power under 28 U.S.C. § 1651 (1970). However, mandamus review of district court orders by the federal appellate courts is far more common. *See* 9 MOORE'S FEDERAL PRACTICE ¶ 110.27, at 290-302 (2d ed. 1975) [hereinafter cited as MOORE'S].

9. Mandamus is available in criminal actions as well. *See, e.g.*, Note, *The Use of Mandamus to Control Prosecutorial Discretion*, 13 AM. CRIM. L. REV. 563 (1976).

10. Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-53 (1961).

11. Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (1789). For a detailed history of the final judgment rule, see Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932).

have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review, may be had in the Supreme Court."[12] The statute does not explicitly prohibit appeals from interlocutory orders of the district courts and one might argue that the courts of appeals are not constrained thereby from creating equitable rules that permit review of such orders.[13] Nevertheless, section 1291 has been construed to require a final judgment in a district court action before nondispositive orders may be appealed.[14]

The policy behind the final judgment rule is sound for several reasons. First, the rule avoids the piecemeal litigation that results from interlocutory appeals.[15] The reviewing court is able to gain a better perspective of all the issues presented in the case when they are consolidated after a final judgment has been rendered. Second, interlocutory appeals delay the progress of a case toward its disposition, frustrating judicial economy and burdening the already congested appellate court dockets.[16] In many instances, these appeals are unnecessary because the contested issues may become moot after a final judgment is rendered.[17] For example, a defendant whose motion for a change of venue is erroneously denied might nevertheless prevail on the merits of his case, making the need for an early appeal superfluous. Needless additional litigation would have resulted had the appeal been allowed immediately after denial of the transfer motion. Third, the unlimited availability of interlocutory review would subject the orderly process of federal court litigation to dilatory tactics, which could cause devastating expense to the parties. Particularly, in complex lawsuits, incessant interlocutory appeals of routine court orders could unfairly debilitate the parties least able to bear the expense and delay of seemingly endless litigation.[18] Finally, some commentators have maintained that routine interlocutory review would undermine the authority of the district court judges.[19]

On the other hand, there are circumstances in which interlocutory review may serve to expedite an action rather than delay it. For example, an immediate appeal of a court order refusing to remand an action to state court might reveal reversible error in the

12. 28 U.S.C. § 1291 (1970).

13. *See* Redish, *supra* note 7, at 125.

14. Kerr v. United States Dist. Court, 426 U.S. 394 (1976); Will v. United States, 389 U.S. 90 (1967); Bankers Life & Cas. Co. v. Holland, 346 U.S. 37(1953).

15. Will v. United States, 389 U.S. 90, 96 (1967); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

16. Redish, *supra* note 7, at 101.

17. *Id.* at 89. The traditional view was that "[o]ne was not really aggrieved until the final judgment." M. GREEN, BASIC CIVIL PROCEDURE 232 (1972).

18. Redish, *supra* note 7, at 101, 104-05.

19. *E.g., id.* at 101.

federal court's determination of subject matter jurisdiction and thus save the time and expense of an improper trial. An interlocutory appeal might also protect a party from the irreparable harm that could result from compliance with a district court order. For example, if a district court orders a news reporter to reveal a confidential news source in a libel or invasion of privacy suit, the reporter may appeal the order after a final judgment has been entered on the merits. But the protection of an appeal is worthless to the reporter unless it can be taken before the information must be revealed.[20] The irreparable harm that can result from the denial of an early appeal is also demonstrated by actions involving trade secrets. As one commentator explains it:

> Although the court could issue protective orders to guard the secret's value, the party may rightfully claim that revealing the information might cause serious competitive harm, and that the opportunity to challenge the information's discoverability on appeal after a final judgment, and after compliance with the district court's order, may prove a rather worthless form of protection.[21]

Thus, the problem facing the federal courts and Congress has been to formulate a sensibly flexible policy that permits interlocutory review when it is in the interest of justice, but avoids the costs and potential abuse of piecemeal litigation. Toward that goal, Congress enacted section 1292 of the Judicial Code,[22] which provides for interlocutory appeals of specified types of district court orders. In addition, the federal courts themselves have carved out a few narrowly-defined exceptions to the final judgment rule. Finally, the appellate courts have allowed the use of the extraordinary, or prerogative, writ of mandamus. It is mandamus with which this Note is concerned, but its significance as a means of obtaining interlocutory appeals should be viewed in the context of the other exceptions to the final judgment rule outlined below.

B. *Judicially-Created Exceptions to the Final Judgment Rule*

Some of the flexibility with which the federal courts have applied the final judgment rule is attributable to the difficulty in precisely defining a final judgment. The traditional definition of a final judgment is "one which ends the litigation on the merits and leaves nothing for the court to do but to execute the judgment."[23] In the vast majority of cases there is little problem in labelling an order on

20. *See, e.g.*, Gialde v. Time, Inc., 480 F.2d 1295, 1303 (8th Cir. 1973) (Heaney, J., dissenting in part).

21. Redish, *supra* note 7, at 99.

22. *See* S. REP. NO. 2434, 85th Cong., 2d Sess. 2-3, *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 5256.

23. Catlin v. United States, 324 U.S. 229, 233 (1945).

that basis as either final or interlocutory.[24] However, there are instances in which orders are appealable as final judgments even though they do not end the litigation on the merits.[25] For example, a district court order quashing service of process on all defendants does not dispose of the merits of the action, but the dismissal is a final judgment from which an appeal may be taken.[26]

The Supreme Court has yet to formulate a single comprehensive definition of a final judgment. "The cases, it must be conceded, are not altogether harmonious."[27] The Court in recent years has favored a pragmatic approach to finality, focusing its inquiry upon the dispositive effect of the judgment. Under the banner of this pragmatic approach the federal courts have created at least four exceptions to the traditional final judgment rule.

The first exception was created by the Supreme Court in *Forgay v. Conrad*.[28] The Court in that case considered the appealability of a district (circuit) court order setting aside a conveyance of land to the defendant and ordering the land's immediate transfer to the plaintiff, an assignee in bankruptcy. Although the order did not constitute a final judgment (an accounting of rents and profits was still to be made), the Court recognized that postponement of an appeal from the order to transfer the land would cause irreparable harm to the defendant. The Court ignored the lack of technical finality:

> The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this Court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.[29]

A commentator has said that the Court's opinion in *Forgay* represents the "genesis of the 'reasoned elaboration' of appealability which the Supreme Court has more openly avowed in recent years."[30]

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> The saving grace of the imprecise rule of finality is that in almost all situations it is entirely clear, either from the nature of the order or from a crystallized body of decisions, that a particular order is or is not final. No one would doubt that a judgment awarding money damages to plaintiff on the only claim involved in the case is a final judgment. No one would doubt that an order denying a motion to dismiss under Rule 12 (b)(6) is interlocutory and not final. The case in which there is real doubt about the finality of an order is extremely rare, although recent cases broadening the concept of finality have created uncertainties.

C. WRIGHT, *supra* note 7, at 505.

25. *See* Redish, *supra* note 7, at 90.

26. Cook v. Bostich, Inc., 328 F.2d 1 (2d Cir. 1964).

27. McGourkey v. Toledo & Ohio Cent. Ry., 146 U.S. 536, 544-45 (1892).

28. 47 U.S. (6 How.) 201 (1848).

29. *Id.* at 203.

30. Note, *Statutory Criteria for Review in the Federal Courts: The Proper Indicia for Appealability?*, 29 U. PITT. L. REV. 365, 373 (1967).

To the extent that the opinion indicates the Court's willingness to consider the practical consequences of a very narrowly-defined species of interlocutory order, this is true; however, the *Forgay* doctrine far from dissolved the final judgment rule. The key to that decision apparently is that the district court's interlocutory order required an immediate transfer of the property, the subject matter of the action.[31] Efforts to use the "irreparable harm" argument alone have not been very successful outside the fact pattern presented in *Forgay*.[32]

The second exception to the final judgment rule is the "collateral orders" doctrine,[33] derived from the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*[34] In *Cohen*, the defendant in a stockholder's derivative action moved to require the plaintiff to post security for the defendant's reasonable expenses, including attorney fees, pursuant to a New Jersey statute. The district court denied the motion, holding that the state statute did not apply to derivative actions in federal court. The Supreme Court unanimously held that the court order was appealable despite its interlocutory nature. The Court utilized a pragmatic approach to define finality:

> This decision appears to fall in that small class which finally determines claims of right separable from, *and collateral to*, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this *practical rather than a technical construction.*[35]

The *Cohen* doctrine is limited to appeals meeting the following requirements: (1) the issues determined in the district court's order must be collateral to the merits of the action; (2) the court's decision must be final, not "tentative, informal, or incomplete"; (3) the appeal must present a "serious and unsettled question" of law; and (4) delay in the appeal must create a risk of irreparable harm to the petitioner.[36] In a later decision, *Eisen v. Carlisle & Jacquelin*,[37] the Supreme Court appears to have relaxed these four requirements;[38] but it is clear from

31. In Perkins v. Fourniquet, 47 U.S. (6 How.) 206 (1848), the companion case to *Forgay*, the Court considered a circuit court order *staying* the transfer of property until an accounting could be completed. The Court held that the order was not appealable.

32. Comment, *supra* note 1, at 299.

33. Professor Redish indicates that the "collateral orders" doctrine was "characterized as an 'interpretation' of section 1291, rather than an exception to it" in United States v. Lansdown, 460 F.2d 164, 170 (4th Cir. 1972); however, he believes that since the doctrine serves to permit interlocutory appeal of an order which does not terminate the litigation, the doctrine is better viewed as an exception to § 1291. Redish, *supra* note 7, at 111 n.120.

34. 337 U.S. 541 (1949).

35. *Id.* at 546 (emphasis added).

36. *See* C. WRIGHT, *supra* note 7, at 508; Redish, *supra* note 7, at 112.

37. 417 U.S. 156 (1974).

38. In *Eisen*, the Supreme Court relied upon the "collateral orders" doctrine, reiterating the first two requirements of *Cohen* set out in the text above. In holding that a district

the Court's statement in *Cohen*,[39] repeated in *Eisen*,[40] that only a small class of orders will qualify for appeal under the doctrine.

A third, very narrow exception, has evolved in the area of class action certifications, arising out of the Second Circuit's decision in *Eisen v. Carlisle & Jacquelin*.[41] The plaintiff in this case was denied representative status for a class of shareholders. Because the plaintiff's individual claim was too small to warrant litigation, the denial of representative status meant, as a practical matter, the termination of the suit. The Second Circuit held that the district court's order was appealable because its effect was the "death knell" of the action.[42] The Supreme Court denied certiorari.[43] Professor Wright has criticized the use of this "death knell" rationale,[44] and has indicated that it has not been received favorably in all circuits.[45]

Finally, the Supreme Court's decision in *Gillespie v. United States Steel Corp.*[46] has been labelled the Court's "sharpest departure from traditional notions of finality."[47] Plaintiff in *Gillespie* brought suit in federal court for claims based on the Jones Act and on a state wrongful death statute. The district court struck the state law claim as well as joinder of the decedent's brother and sisters as co-plaintiffs. The Sixth Circuit classified the order as interlocutory, yet permitted an immediate appeal on its merits.[48] The Supreme Court affirmed,[49] describing the order as one within "the 'twilight zone' of finality."[50] Applying its previously announced "practical" approach to the final judgment rule, the Court spoke of balancing "the inconvenience and costs of piecemeal review on the one hand and

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court order imposing the prohibitive cost of notifying members of a class could be appealed before final judgment, the Court made no mention of the "serious and unsettled question" requirement of *Cohen*, although, as commentators have noted, that requirement was certainly met in *Eisen*. *See, e.g.*, C. WRIGHT, *supra* note 7, at 508.

Nor does *Eisen* mention the fourth requirement of irreparable harm. One commentator believes that cases decided after *Cohen* indicate that the irreparable harm element is only incidental to the *Cohen* rationale. Comment, *supra* note 1, at 301. However, Professor Wright has stated that irreparable harm is still a requirement of the "collateral orders" doctrine. C. WRIGHT, *supra* note 7, at 508. The lower federal courts have not been consistent in reading *Cohen* and *Eisen*. *Id.* at 509-10.

39. 337 U.S. at 546.

40. 417 U.S. at 172.

41. 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967).

42. *Id.* at 120-21.

43. 386 U.S. 1035 (1967).

44. C. WRIGHT, *supra* note 7, at 510.

45. The "death knell" doctrine has been accepted in some circuits and rejected in others. *See id.* at 509.

46. 379 U.S. 148 (1964).

47. C. WRIGHT, *supra* note 7, at 511.

48. 321 F.2d 518, 522 (6th Cir. 1963), *aff'd*, 379 U.S. 148 (1964).

49. 379 U.S. 148 (1964).

50. *Id.* at 152.

the danger of denying justice by delay on the other,"[51] and concluded that in *Gillespie* the latter outweighed the former.[52]

The opinion drew sharp criticism for its murkiness from one commentator[53] who nevertheless considers *Gillespie* the foundation of a new "balancing approach" by the Court.[54] However, neither the "balancing approach" nor the *Gillespie* decision itself[55] has received much attention from the federal courts.[56]

In summary, the Supreme Court's pragmatic rather than technical approach to finality has led to the creation of several exceptions to the final judgment rule. None of these narrowly-defined exceptions, however, has had much impact on the arbitrariness of the final judgment rule.

C. *Statutory Interlocutory Appeals*

By enacting what is presently section 1292(a) of the Judicial Code,[57] Congress designated certain district court orders relating to injunctions, receiverships, patent infringement actions, and admiralty actions as worthy of interlocutory appeal. In addition, interlocutory appeals may be taken from certain bankruptcy orders.[58] In 1958, Congress added subsection (b) to section 1292, bestowing power upon the federal courts to hear discretionary interlocutory appeals. Section 1292(b) states:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may

51. *Id.* at 152-53 (citing Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950)).

52. 379 U.S. at 153.

53. "The Court's opinion in *Gillespie* is astounding for its clouded reasoning and enigmatic conclusions. It is unfortunate that a decision which may represent a truly significant adjustment of the entire philosophy of appealability is so devoid of any persuasive analysis." Redish, *supra* note 7, at 118.

54. Professor Redish advocates the "balancing approach" as an independent exception to the final judgment rule. Such an exception would take into consideration the "external" consequences of an interlocutory order, such as

> (1) the delay which might result before the case would ultimately be heard on appeal after a final judgment, (2) the harm this delay would cause to the litigant's financial or personal situation, and (3) the length and expense of discovery and trial, in relation to the relative financial capabilities of the parties seeking appeal, that may prove unnecessary if the district court's order is ultimately reversed.

Redish, *supra* note 7, at 100.

55. "[F]or the most part *Gillespie* has either been ignored by the courts of appeals or invoked to justify appeals that could have been explained on more traditional notions of finality." C. WRIGHT, *supra* note 7, at 511-12.

56. Redish, *supra* note 7, at 98, 120-21.

57. 28 U.S.C. § 1292(a) (1970).

58. 11 U.S.C. §§ 47, 48 (1970).

thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.[59]

This subsection requires that the appeal meet three requirements: (1) the district court order must present a "controlling question of law"; (2) that question must be one upon which there is "substantial ground for difference of opinion"; and (3) the appeal must be one that "may materially advance the ultimate termination of the litigation." Dual certification of these elements by both the district court and the court of appeals is necessary before the appeal may be heard.[60] Whether either certification is granted is totally within the discretion of the district and appellate courts.[61] If the district court certifies the appeal, the court of appeals may refuse to consider it without even stating its reasons for the refusal.[62]

Although section 1292(b) appears on its face to be a readily available escape valve from the final judgment rule, the federal courts generally have construed this section narrowly by insisting upon strict satisfaction of the three statutory requirements. These three requirements "are not to be read so broadly that the district court can allow appeal whenever it would promote the 'efficient administration of justice,' since the Judicial Conference draftsmen deliberately rejected this phraseology in favor of a more restricted wording."[63] Despite what appears to be a contrary indication from the draftsmen, one commentator has described section 1292(b) as requiring a "skillful balancing of many factors by the district judge."[64] But another

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59. 28 U.S.C. § 1292(b) (1970). For more background on § 1292(b), including its legislative history, see Comment, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333 (1959).

60. Note, *supra* note 10, at 379. A district court's certification of an interlocutory appeal under § 1292(b) should not be confused with certification of an appeal under Rule 54(b) of the Federal Rules of Civil Procedure. Rule 54(b) permits a district court to direct judgment with regard to one or more but fewer than all the claims or parties in an action. An immediate appeal may then be taken from the judgment.

An order certified for appeal under Rule 54(b) constitutes a final judgment with regard to those claims or parties severed from the rest of the lawsuit still pending. Thus, while a § 1292(b) appeal is a departure from the final judgment rule, a Rule 54(b) appeal is not. Note, *supra* note 10, at 381.

61. Redish, *supra* note 7, at 108.

> The rationale of a double discretionary system is that the district court, better able to gauge both the timesaving from a reversal and the presence of dilatory motives in the request for appeal, can protect the appellate courts from an inundation of applications for appeal, while the appellate court, free from the temptations and pressures which face the district court, can better estimate the likelihood of error and the burden upon its own docket.

Note, *supra* note 10, at 379.

62. Redish, *supra* note 7, at 109.

63. Comment, *supra* note 59, at 341.

64. *Id.* at 343.

commentator, who himself advocates the adoption of a "balancing approach" to interlocutory appeals in general, believes that section 1292(b) falls far short of that approach.[65] In any event, the district courts and courts of appeals have not certified many appeals on the basis of section 1292(b)[66] and generally have limited its application to exceptional cases.[67]

II. MANDAMUS REVIEW

A. *Development of Mandamus Review in the Federal Courts*[68]

Whether a federal court of appeals may entertain an appeal of an interlocutory order presented by petition for a writ of mandamus is a question of propriety, not of power.[69] The *power* to issue this and other extraordinary writs was vested in the federal courts by the Judiciary Act of 1789,[70] and is today codified in section 1651 of the Judicial Code:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.[71]

On the other hand, the *propriety* of using mandamus to invoke appellate jurisdiction over an interlocutory order has been the subject of much disagreement among the circuits, due in part to a history of inconsistent guidance with regard to mandamus from the Supreme Court.

Although issuance of the writ is within the discretion of the appellate courts,[72] that discretion generally has been exercised con-

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65. Professor Redish believes his "balancing approach," "[b]y painting with a broader brush, . . . allows the court to focus on the unique circumstances of individual cases, to weigh the likelihood of reversal of an interlocutory order *against the burdens the litigants might face if appeal were rejected.*" Redish, *supra* note 7, at 111 (emphasis added).

The burden upon the litigants is generally one of what Professor Redish calls "external consequences" of the unavailability of immediate appeal. Section 1292(b), he argues, is solely concerned with "internal consequences." "The economic or personal hardship that may result from an adverse interlocutory order is irrelevant for section 1292(b) purposes: if allowing appeal does not increase the chances of an earlier termination of the case, the statutory exception [to the final judgment rule] offers no relief." *Id.* at 110.

66. C. WRIGHT, *supra* note 7, at 518-19; Redish, *supra* note 7, at 109.

67. C. WRIGHT, *supra* note 7, at 518.

68. A discussion of the origins and development of mandamus may be found in Note, *supra* note 9, at 564-70.

69. Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943).

70. Note, *supra* note 10, at 375.

71. 28 U.S.C. § 1651 (1970). Other writs authorized by this statute include prohibition, common law certiorari, injunctions, and habeas corpus. 9 MOORE'S ¶ 110.26, *supra* note 8, at 278-79.

72. La Buy v. Howes Leather Co., 352 U.S. 249 (1957); *Ex parte* Peru, 318 U.S. 578 (1943).

servatively[73] so that the policy against piecemeal litigation is not frustrated.[74] Mandamus traditionally may be used only when no other means of appeal is available,[75] and even then only in "extraordinary causes."[76] The Supreme Court said in 1943 that the appellate courts could issue the writ only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."[77] By 1953, the Court had elaborated on the propriety of mandamus by including a district court's "usurpation of power"[78] or "abuse of discretion"[79] as grounds for issuance of the writ. But the opinion in *Bankers Life & Casualty Co. v. Holland*[80] made it clear that the availability of mandamus was still limited to the extraordinary case. In *Holland*, mandamus was held to be an inappropriate means of reviewing a district court's determination of improper venue because, even if the district court had erred in its holding on the question of venue, no abuse of discretion or power could be found in the court's order. Commenting on the consequences that would have resulted had the writ been approved, Justice Clark wrote:

> The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power." . . . This is not such a case.[81]

In its decisions before 1957 the Supreme Court seemed to be resolutely opposed to any expansion of the mandamus remedy.[82] Gradually, however, the Court extended the concept of "usurpation

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73. C. WRIGHT, *supra* note 7, at 516.

74. Parr v. United States, 351 U.S. 513, 520 (1956).

75. *Ex parte* Peru, 318 U.S. 578 (1943). Mandamus may not be used as a "substitute" for appeal. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953); *Ex parte* Fahey, 332 U.S. 258 (1947).

76. *Ex parte* Fahey, 332 U.S. 258, 260 (1947).

77. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943). An example of an appellate court's use of mandamus to compel a district court to exercise its "duty" can be found in Hall v. West, 335 F.2d 481 (5th Cir. 1964). In that case, petitioners sought to expedite the district court's own order, issued four years earlier, calling for desegregation of the local school system. The Fifth Circuit, by writ of mandamus, ordered the lower court to perform its duty, *i.e.* to issue a mandatory injunction ordering the submission of a desegregation plan.

78. *E.g.*, DeBeers Consol. Mines v. United States, 325 U.S. 212, 217 (1945).

79. *E.g.*, Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

80. 346 U.S. 379 (1953).

81. *Id.* at 383 (citations omitted).

82. *See, e.g.*, Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953); Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943); *Ex parte* Peru, 318 U.S. 578 (1943).

of power" to encompass improper actions of district courts other than those relating solely to the wrongful assumption of jurisdiction, as for example, when mandamus was used successfully to challenge the improper denial of a jury trial in civil actions.[83]

A significant expansion of mandamus review came in *La Buy v. Howes Leather Co.*[84] The district court in *La Buy* had referred certain antitrust actions to a master pursuant to Rule 53(b) of the Federal Rules of Civil Procedure. All parties to the actions unsuccessfully moved to vacate the references. The Seventh Circuit issued writs of mandamus, vacating the references, and the Supreme Court affirmed. The Court in *La Buy* noted that for several years the trial judges of the Seventh Circuit had made an excessive number of references to masters. Despite the interlocutory nature of the district court's order, the Court considered the need for prompt review of this practice compelling. The references, said the Court, "amounted to little less than an abdication of the judicial function depriving the parties of a trial before the court on the basic issues involved in the litigation."[85] Distinguishing the situation from that in *Holland*, the Court found this to be a "clear abuse of discretion."[86] Most significant are the closing remarks of the opinion: "We believe that *supervisory control of the District Courts* by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."[87]

By its allusion to a supervisory power vested in the courts of appeals, the Supreme Court appeared to be creating a novel, special function of mandamus review. On the other hand, "supervisory control" may refer to nothing more than the traditional function of the mandamus writ confining the district courts to their jurisdiction and correcting their usurpations of power. But commentators have tended to view *La Buy* as a genuine expansion of mandamus beyond its traditional limits.[88] This "supervisory power" was tested by the Seventh Circuit two years later in *Atlass v. Miner.*[89] There the district court in an admiralty case had directed that oral discovery be made pursuant to

83. *E.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

84. 352 U.S. 249 (1957).

85. *Id.* at 256.

86. *Id.* at 257.

87. *Id.* at 259-60 (emphasis added).

88. *E.g.*, Redish, *supra* note 7, at 114; Note, *supra* note 10, at 376; Note, *supra* note 30, at 369. A very thorough analysis of the "supervisory mandamus" aspect of *La Buy* can be found in Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973). *La Buy* was criticized in Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 771-78 (1957).

89. 265 F.2d 312 (7th Cir. 1959), *aff'd*, 363 U.S. 641 (1960).

a local district court rule. The court of appeals issued a writ of mandamus vacating the order, holding that the local court rule was in conflict with the admiralty rules. The appellate court found that the resolution of the admiralty rule issue would "serve to avoid a conflict in the district courts of this circuit."[90] The Supreme Court affirmed,[91] but did not discuss the appellate court's use of "supervisory mandamus."

The Supreme Court may have expanded the scope of mandamus even further by sanctioning its use for the review of discovery orders in *Schlagenhauf v. Holder*.[92] The district court in *Schlagenhauf* ordered the defendant in a negligence action to submit to nine separate physical and mental examinations, purportedly under power granted to district courts by rule 35 of the Federal Rules of Civil Procedure.[93] The defendant challenged the court's power to order an examination of *any defendant* under rule 35. Furthermore, the defendant claimed that his physical condition was not "in controversy" and that the examination was not sought "for good cause" as required by rule 35.

The Seventh Circuit assumed jurisdiction over the merits of the appeal by considering defendant's application for mandamus. But the court of appeals ultimately denied the writ, holding that the lower court did have power under rule 35 to order an examination of a defendant.[94] The court of appeals went on to find that defendant's physical condition was "in controversy," but the court left the issue of "good cause" undecided. The Supreme Court vacated the appellate court's order, disagreeing on the merits of the appeal. Although the Court upheld the *power* of a district court to order examinations made of a defendant, it nevertheless found the order for examinations to be improper because the record failed to show that defendant's condition was "in controversy" and that there was "good cause" for the examinations.[95]

In *Schlagenhauf*, the Court indicated that mandamus review was an appropriate method by which the court of appeals could consider the power of the district court under rule 35. Noting that *Schlagenhauf* was the first reported federal court case in which a district court had used rule 35 to order an examination of a defendant, the Court defended the use of mandamus, stating:

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90. *Id.* at 313.

91. 363 U.S. 641 (1960).

92. 379 U.S. 104 (1964).

93. FED. R. CIV. P. 35(a), at the time of the *Schlagenhauf* decision, provided in relevant part:

> In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion *for good cause shown*. . . .

379 U.S. at 106 (emphasis added).

94. 321 F. 2d 43 (7th Cir. 1963), *vacated*, 379 U.S. 104 (1964).

95. 379 U.S. at 118-19.

> [T]he petition was properly before the court on a substantial allegation of *usurpation of power* in ordering any examination of a defendant, *an issue of first impression that called for construction and application of Rule 35 in a new context.* The meaning of Rule 35's requirements of "in controversy" and "good cause" *also raised issues of first impression.* In our view, the Court of Appeals should have also, under these special circumstances, determined the "good cause" issue, so as to avoid piecemeal litigation *and to settle new and important problems.*[96]

It has been suggested that *Schlagenhauf* builds upon the "supervisory power" alluded to in *La Buy* and perhaps provides the basis for an "advisory power" as well in the federal appellate courts.[97] This concept of "advisory mandamus" has its roots in the Court's emphasis of the "first impression" nature of the issues involved and the need "to settle new and important problems," at least with respect to construction of the Federal Rules of Civil Procedure.

However, the Supreme Court later weakened the "supervisory" and "advisory" rationales of mandamus review in *Will v. United States.*[98] *Will* involved a criminal prosecution for tax evasion. The district court granted defendant's request for a bill of particulars and ordered the government to provide defendant with information about defendant's own allegedly inculpatory statements. Using mandamus, the Seventh Circuit Court of Appeals granted the government's request for interlocutory review and vacated the district court order without opinion. The Supreme Court unanimously reversed the mandamus order, stating that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[99] The Court went on to dilute the "first impression" rationale of advisory mandamus attributed to *Schlagenhauf*:

> [I]t cannot be contended that *Schlagenhauf* on its facts supports an invocation of mandamus in this case. The Court there did note that the various questions concerning the construction of Rule 35 were new and substantial, but it rested the existence of mandamus jurisdiction squarely on the fact that there was real doubt whether the District Court had any power at all to order a defendant to submit to a physical examination.[100]

In addition, the Court restricted the supervisory mandamus rationale of *La Buy* to instances in which a district judge displayed a persistent disregard of the Federal Rules of Civil Procedure.[101]

The *Will* decision has been viewed by some as a general retraction

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96. *Id.* at 111 (emphasis added).
97. Note, *supra* note 88, at 613-19.
98. 389 U.S. 90 (1967).
99. *Id.* at 95.
100. *Id.* at 104-05 n. 14.
101. *Id.* at 96, 104 n. 14.

of the *La Buy* and *Schlagenhauf* "expansions" of mandamus review.[102] The Supreme Court, however, has not yet asserted a clearly definitive formulation of mandamus review of interlocutory orders.[103] The vagueness of the traditional "abuse of discretion" and "usurpation of power" tests has left considerable freedom for the Court to mold mandamus relief to suit the needs of the federal court system. At one extreme, *La Buy* and *Schlagenhauf* appear to authorize broad supervisory and advisory powers in the appellate courts to curb district court excesses and to guide the district courts in the resolution of "novel" questions. At the other extreme, *Will* re-emphasizes the extraordinary nature of mandamus and reverts its use to its traditional function of remedying the improper assumption of jurisdiction by the inferior courts. As these cases indicate, the Court's approach has been an incremental one that has defined the parameters of mandamus review by rare example. Even the most recent decisions of the Court fail to resolve much of the controversy.[104] Thus, to a large extent the courts of appeals have been free to utilize mandamus review within reasonable limits.

B. *Mandamus and Section 1292(b) Compared*

Before the enactment of section 1292(b) in 1958, mandamus was regarded as a principal means of tempering the arbitrariness of the final judgment rule on the theory that the extraordinary writ was appropriate because in most cases no other remedy existed.[105] When Congress enacted section 1292(b), placing discretionary authority in the appellate courts to hear interlocutory appeals, the need for mandamus was generally expected to be greatly reduced.[106] Indeed, since mandamus is unavailable when a section 1292(b) interlocutory appeal —or any other remedy—is appropriate,[107] a party seeking to obtain mandamus is well advised to first attempt certification of the appeal under that statute.[108] If the district court refuses to certify the ap-

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102. *E.g.* Redish, *supra* note 7, at 115. *But see* C. WRIGHT, *supra* note 7, at 517; Note, *supra* note 88, at 621-22.

103. *See, e.g.*, 4 MOORE'S ¶ 26.83 [9.-3], *supra* note 8, at 626.

104. *Compare* Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976) (mandamus held appropriate to remedy case improperly remanded to state court) *with* Kerr v. United States District Court, 426 U.S. 394 (1976) (mandamus not appropriate to vacate order requiring discovery of allegedly privileged documents). Both the *Thermatron Products* and *Kerr* cases are discussed in section III of this Note, *infra*.

105. *See, e.g.*, 6 J. MOORE, FEDERAL PRACTICE ¶ 54.10[1] (2d. ed. 1953); Note, *Federal Review by Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule*, 63 YALE L. J. 105 (1953); Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102 (1950).

106. C. WRIGHT, *supra* note 7, at 517; Note, *supra* note 10, at 378.

107. *See* Roche v. Evaporated Milk Ass'n., 319 U.S. 21 (1943); Mohasco Indus., Inc. v. Lydick, 459 F. 2d 959 (9th Cir. 1972).

108. *See* Watkins v. Watkins, 260 F.2d 548 (5th Cir. 1958).

peal, of course, the court of appeals will not have the opportunity to consider the appeal under section 1292(b). At that point the appellate court may be petitioned to acquire jurisdiction over the interlocutory appeal by its power to consider the mandamus writ. If the district court does certify the appeal under section 1292(b), appellants are wise to petition the court of appeals for the section 1292(b) appeal and in the alternative for mandamus.

The writ continues to be appropriate if "the case is of that rare sort that would have been appropriate for review by mandamus or prohibition prior to 1958."[109] In other words, the vitality of mandamus relief has not been abrogated by the addition of section 1292(b), in part because the standards for determining the propriety of the two remedies are different. Section 1292(b) permits the appeal only when it involves a "controlling question of law as to which there is substantial ground for difference of opinion," the immediate consideration of which "may materially advance the ultimate termination of the litigation." These statutory elements are not specific requirements for the issuance of mandamus. For example, the "expediting" aspect of an appeal required by section 1292(b) is not crucial to mandamus review, although the possibility of advancing the litigation may weigh in favor of permitting the writ.

Mandamus is based on notions of "usurpation of power" and "abuse of discretion."[110] It has been suggested that mandamus will not reach "mere errors of law"[111] since these are appealable either as final judgments or under section 1292(b). Thus, a petition for mandamus "subjects the appellate court to the rigid peremptory standard of 'abuse of discretion' in contrast to the broader review by appeal where [the court's] function is to determine whether the District Court's decision is right on its intrinsic merits."[112] But the distinction between a mere error of law and an abuse of discretion is not always a clear one. For instance, in Justice Brennan's dissenting opinion in *La Buy* the excessive practice of referring cases to masters was described as at most mere error on a matter within the judge's jurisdiction, thereby making mandamus inappropriate.[113] The majority of the Court, however, viewed the district court's prac-

109. C. WRIGHT, *supra* note 7, at 517.

110. Will v. United States, 389 U.S. 90, 95 (1967); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953).

111. *See* Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382-83 (1953). The Court held mandamus to be inappropriate in Parr v. United States, 351 U.S. 513, 520 (1956), holding in that case that "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction."

112. Auerbach v. United States, 347 F.2d 742, 743-44 n.2 (5th Cir. 1965) (Brown, J., dissenting).

113. 352 U.S. at 261 (Brennan, J., dissenting).

tice as both an abuse of discretion[114] and an abuse of power.[115]

One writer has concluded that "[t]he rather tenuous distinction between 'mere' error and 'abuse of discretion' provides the appellate courts with the opportunity to exercise their extraordinary power whenever they consider immediate review appropriate."[116] There appears to be some truth in this. Consider two Ninth Circuit decisions, *Pan American World Airways, Inc. v. United States District Court*[117] and *McDonnell Douglas Corp. v. United States District Court*,[118] both involving class actions on behalf of airline crash victims. In the *Pan American* case, the district court decided to notify all potential plaintiffs that actions arising from the crash were pending before it. After the district court denied certification of a section 1292(b) appeal, the defendants successfully petitioned the court of appeals for mandamus. The Ninth Circuit reversed the notification order, holding that the district court had acted without apparent authority vested in it by statute or rule. On the propriety of mandamus, the court of appeals stated:

> While the distinction between error subject to adequate review on appeal and "usurpation of power" sufficient for mandamus may not always be clear . . . , the order in this case falls within the latter category. Notice from the court to potential plaintiffs not authorized explicitly by statute or rule *is so extraordinary* that review of such actions by mandamus will not frustrate the congressional policy permitting appeals only from final judgments.[119]

Pan American demonstrates the facility with which an appellate court can find an abuse of discretion in an "extraordinary case" in order to invoke mandamus review. The Ninth Circuit also granted mandamus in the *McDonnell Douglas* case based on an almost bare conclusion that the district court's certification of the suit as a class action was an abuse of discretion.[120]

It is virtually impossible to summarize the circumstances in which the various federal courts of appeals have permitted mandamus review of interlocutory orders. The body of federal case law on the subject is replete with variations from circuit to circuit. In the next section, three categories of typical interlocutory orders—change of venue orders, remand orders, and discovery orders—are examined to illustrate the circumstances under which review by mandamus has been permitted. In each of these categories the Supreme Court has commented upon the propriety of mandamus review.

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114. *Id.* at 257.
115. *Id.* at 256.
116. Note, *supra* note 10, at 377.
117. 523 F.2d 1073 (9th Cir. 1975).
118. 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).
119. 523 F.2d at 1076 (emphasis added).
120. 523 F.2d at 1087.

III. Representative Uses of Mandamus Review

A. *Change of Venue Orders*

The choice of a forum may have an important effect on the prospects for success in an action. Especially when the adverse parties are states apart, the district court's ruling on a defendant's motion for a change of venue may be crucial to the effective prosecution or defense of the case. The party that loses on the motion will have to bear the inconvenience and expense of litigating the action in a distant forum. That inconvenience and expense can be disastrous in complex lawsuits because the trial in another district may necessitate transportation of numerous witnesses, records, and exhibits as well as the parties themselves. When a change of venue is granted and the plaintiff is the party who must travel, the costs and inconvenience may be so prohibitive in relation to the amount of damages sought that the transfer itself may be the "death knell" of the action. Thus, the losing party to a transfer order will often desire an immediate appeal from the order.

The statute authorizing changes of venue in the federal court system is section 1404 of the Judicial Code, subsection (a) of which provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[121] The statute combines in a motion for change of venue both issues of law and matters within the discretion of the district court. The issues of law presented include the determination of proper venue required in both the transferor and transferee courts. If venue does not exist in the transferor court, then section 1404(a) is not the proper statutory ground for transfer of the action.[122] Furthermore, the transferee court must be one in which the action "might have been brought" originally.[123] Error in the transferor court's determination of those questions is appealable immediately under section 1292(b) if both the transferor district court and its court of appeals certify the appeal under the requirements of that section.[124]

Even if the district court makes a correct determination that transfer of the action would be proper under section 1404(a), the decision to transfer is one within the sound discretion of the transferor court.[125] This discretion, however, is not unrestrained. Sec-

121. 28 U.S.C. § 1404(a) (1970).

122. Section 1404(a) presupposes that venue is technically correct in both the transferor and transferee forums. *See* 1 Moore's ¶ 0.145[3], *supra* note 8, at 1584.

123. Van Dusen v. Barrack, 376 U.S. 612 (1964); Hoffman v. Blaski, 363 U.S. 335 (1960).

124. *E.g.*, Continental Grain Co. v. Federal Barge Lines, Inc., 268 F.2d 240 (5th Cir. 1959); Orzulak v. Federal Commerce & Nav. Co., 168 F. Supp. 15 (E.D. Pa. 1958).

125. *E.g.*, New York, C & St. L. R. Co. v. Vardaman, 181 F.2d 769 (8th Cir. 1950); LeClair v. Shell Oil Co., 183 F. Supp. 255 (S.D. Ill. 1960).

tion 1404(a) itself provides that transfer of the case must be both "for the convenience of parties and witnesses" and "in the interest of justice." In addition, the federal courts have elaborated upon the exercise of sound discretion, noting, for instance, that the plaintiff's choice of forum is entitled to "paramount consideration"[126] or at least "substantial weight"[127] in deciding whether transfer would be "in the interest of justice." As one court has explained it:

> Unless the balance of convenience strongly favors the defendant, the plaintiff's choice of forum will not be disturbed. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). . . . The movant must make a clear-cut showing that, on balance, the interest of justice would be better served and the trial would more conveniently proceed in the other judicial district . . . .
>
> Moreover, a showing of inconvenience to the defendant is not enough to justify § 1404(a) relief, where transfer would merely place the inconvenience on the plaintiff.[128]

When the sole objection to the transferor court's order granting or denying transfer rests upon an allegation of abuse of discretion, as opposed to an error of law in determining the existence of venue, an interlocutory appeal under section 1292(b) is generally not permitted.[129] Whether mandamus may provide the means for an immediate appeal has not been clearly decided by the Supreme Court, although the Court has had several opportunities to provide an answer. In *Bankers Life & Casualty Co. v. Holland*,[130] the Court held that mandamus was not available to correct an order based on section 1406(a), rather than section 1404(a), of the Judicial Code. Section 1406(a), applicable in cases in which venue is improper in the original forum, provides: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."[131] Whether venue exists in a district is a question of law, an erroneous determination of which might give rise to an appeal under section 1292(b).[132] The only apparent exercise of discretion vested in the

126. Dow Chemical Co. v. Monsanto Co., 256 F. Supp. 315, 316 (S.D. Ohio 1966).

127. Hayes v. Chesapeake & Ohio Ry. Co., 374 F. Supp. 1068 (S.D. Ohio 1973).

128. Toti v. Plymouth Bus Co., 281 F. Supp. 897, 898 (S.D.N.Y. 1968). *Cf.* Nicol v. Koscinski, 188 F.2d 537, 537 (6th Cir. 1951) ("plaintiff's choice of forum should rarely be disturbed").

129. *E.g.*, Standard v. Stoll Packing Corp., 315 F.2d 626 (3d Cir. 1964).

130. 346 U.S. 379 (1953).

131. 28 U.S.C. § 1406(a) (1970).

132. *E.g.*, in Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962), the original district court held that venue was improper and transferred the action to a proper venue. The transferee court then held that the transfer was improper because the transferor court had not obtained personal jurisdiction over some of the defendants. As to those defendants, the transferee court dismissed. The court of appeals, upon an appeal permitted under § 1292(b), affirmed the dismissal. The Supreme Court, however, reversed on the merits of the appeal, holding that the transferor court's

district court by section 1406(a) is the choice of dismissing the action or transferring it if "in the interest of justice." The district court in *Holland* determined that venue was not properly laid in that forum and therefore ordered the action transferred. The Fifth Circuit dismissed a mandamus petition challenging the order, and the Supreme Court affirmed. Mandamus was inappropriate, the Court held, because no usurpation of power or abuse of discretion was discernible in the district court's actions.[133] At most, the determination of improper venue was "mere error" which mandamus could not remedy.[134] Since *Holland* appears to be limited to the review of questions of law involved in the application of section 1406(a), the decision does not explicitly preclude review by mandamus of abuses of discretion under section 1404(a). In at least three subsequent decisions involving attempts to challenge transfer orders by mandamus, the Supreme Court has rejected opportunities to comment upon the mandamus remedy.[135]

In the absence of a clear directive from the Supreme Court, the appellate courts have taken a conservative view toward the use of mandamus to review transfer orders. Generally, the appellate courts will not permit mandamus review of district court discretion unless a clear abuse of that discretion is shown.[136] For example, in *A. Olinick & Sons v. Dempster Brothers, Inc.*[137] the Second Circuit reviewed an order transferring a case pursuant to section 1404(a) and held that mandamus would not be issued since the district court had properly considered the convenience of the parties and witnesses in concluding that transfer would be in the interests of justice. But the Seventh Circuit found an abuse of discretion in *Chicago, Rock Island & Pacific Railroad Co. v. Igoe*,[138] a case in which the district court had refused to transfer the action. Upon considering the relative convenience of transfer to the parties and witnesses, the appellate court issued the mandamus writ after concluding that it was in the interest of justice to grant defendant's requested change of venue. It appears therefore that section 1292(b) provides a means for reviewing transfer orders in cases in which the existence of venue in either the transferor

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lack of personal jurisdiction over some of the defendants did not invalidate the transfer. An appeal under § 1292(b), of course, was not possible in *Holland* since the statute was not enacted until 1958.

133. 346 U.S. at 382-83.

134. *But see* C-O-Two Fire Equip. Co. v. Barnes, 194 F.2d 410 (7th Cir.), *aff'd*, 344 U.S. 861 (1952), in which mandamus was permitted to review a district court order determining that venue was proper, and that no dismissal or transfer would lie under section 1406(a).

135. Van Dusen v. Barrack, 376 U.S. 612 (1964); Hoffman v. Blaski, 363 U.S. 335 (1960); Norwood v. Kirkpatrick, 349 U.S. 29 (1955).

136. *See, e.g.*, Lemon v. Druffel, 253 F.2d 680 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *Ex parte* Chas. Pfizer & Co., 225 F.2d 720 (5th Cir. 1955); All States Freight, Inc. v. Modarelli, 196 F.2d 1010 (3d Cir. 1952).

137. 365 F.2d 439 (2d Cir. 1966); *accord*, Nicol v. Koscinski, 188 F.2d 537 (6th Cir. 1951).

138. 220 F.2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955).

or transferee forum is disputable. When venue exists, however, and the only contestable question is the relative convenience of a change of venue to all parties and witnesses, mandamus may be the only means of reviewing the district court's discretion.

B. *Remand Orders*

Just as parties may maneuver to obtain the most favorable venue in a federal court action, they may similarly be concerned with whether the action will be maintained in a federal or a state court. The importance of the court system in which the action is to be tried has lessened somewhat since the Supreme Court in *Erie Railroad v. Tompkins*[139] declared the applicable substantive law in a diversity action to be that of the state in which the federal court sits. Nevertheless, parties may still have valid reasons for preferring either state or federal court to the other, for reason of such differences as rules of pleading and procedure, rules of evidence, the number of jurors required to reach a verdict, supervision of discovery, and congestion of court dockets.[140] Furthermore, an action removed to federal court may be transferred by an order granting a change of venue as earlier discussed. Thus, the disenchanted party to an order shifting an action to state or federal court may wish to have an immediate appeal to save unnecessary time and expense in what could be an improper forum.

Removal of an action from state to federal court is authorized by several federal statutes, the most commonly used being section 1441 of the Judicial Code.[141] The central requirement of section 1441 is that the federal court have original jurisdiction of the action sought to be removed. An action so removed may be challenged by a motion to remand the case to state court, pursuant to section 1447(c) which provides:

> If at any time before final judgment it appears that the case was removed *improvidently and without jurisdiction*, the district court *shall* remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.[142]

This section clearly mandates the remand of any action removed "improvidently and without jurisdiction." It thus poses a question of law concerning federal subject matter jurisdiction and leaves no room for the exercise of any discretion.

No appeal will ordinarily be allowed from a district court order

139. 304 U.S. 64 (1938).

140. *See* 7B MOORE'S [89-13], *supra* note 8, at JC-686-87.

141. 28 U.S.C. § 1441 (1970).

142. 28 U.S.C. § 1447(c) (1970) (emphasis added).

remanding or refusing to remand an action since such an order is interlocutory, not final.[143] Moreover, the review of an order remanding a case to state court is specifically forbidden by section 1447(d):

> An order remanding a case to the State from which it was removed *is not reviewable on appeal or otherwise,* except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title [civil rights cases] shall be reviewable by appeal or otherwise.[144]

This provision has been held to prohibit the use of section 1292(b) to obtain an interlocutory appeal of a remand order.[145] The statute says nothing, however, about orders *denying* remand of an action and apparently section 1292(b) discretionary appeals are available to review these.[146]

The Supreme Court has held in several cases that, as a general rule, mandamus will not lie to vacate a district court order *denying* remand.[147] The probable reason for this is that an improper refusal to remand typically results from a district court's incorrect determination that it has federal jurisdiction over the subject matter of the action. Such an incorrect determination constitutes an error of law, not an abuse of discretion, and therefore mandamus would not be an appropriate remedy. However, since the traditional function of the writ has been "to confine an inferior court to a lawful exercise of its prescribed jurisdiction,"[148] it would seem that an order improperly denying remand should be subject to review by mandamus.

As previously indicated, an order *granting* remand of a case is "not reviewable, on appeal *or otherwise*," according to section 1447(d). The "or otherwise" language ostensibly includes review by mandamus. Yet the Supreme Court recently allowed mandamus review of a remand order in *Thermtron Products, Inc. v. Hermansdorfer.*[149] In *Thermtron Products*, plaintiffs, citizens of Kentucky, brought a personal injury action in a Kentucky state court against defendants, citizens of Indiana. The defendants removed the action to a federal district court in Kentucky, alleging diversity of citizenship as the basis for federal jurisdiction. The federal court then, *sua*

143. 7B MOORE'S, *supra* note 8, at JC-728.1-729.

144. 28 U.S.C. § 1447(d) (1970) (emphasis added).

145. *In re* Bear River Drainage Dist., 267 F.2d 849 (10th Cir. 1959). The district court in *Bear River* remanded to state court an action to adjudicate water rights. The United States, which had removed the action originally, sought an interlocutory appeal of the remand order. The Tenth Circuit held that the remand, whether erroneous at law or not, left the appellate court without jurisdiction over the action. The court of appeals stated that by enacting § 1292(b), Congress did not intend to abandon its policy expressed in § 1447(d).

146. 7B MOORE'S, *supra* note 8, at JC-438; Comment, *supra* note 59, at 351.

147. *E.g., Ex parte* Park Square Auto. Station, 244 U.S. 412 (1917). *But see In re* Winn, 213 U.S. 458 (1909).

148. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

149. 423 U.S. 336 (1976).

sponte, remanded the case back to the state court. In a short opinion, the district court cited its crowded docket as the reason for remand. Although conceding that it had federal subject matter jurisdiction over the claim, the lower court held that the defendants' "right" to remove the case under section 1441 had to be "balanced against plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action."[150] Defendants then filed an alternative petition for a writ of mandamus or prohibition in the Sixth Circuit Court of Appeals. The writ was denied, partly because of the prohibition against review of a remand order "on appeal or otherwise" contained in section 1447(d).[151]

The Supreme Court reversed the court of appeals and approved the use of mandamus to correct the remand of an action not based on the grounds authorized by section 1447(c), notwithstanding subsection (d). Justice White's opinion for the Court recites the litany of prior mandamus decisions of the Court, but fails to pinpoint any clear precedent for the review of a remand order. Instead, the opinion rests the propriety of mandamus upon the cursory observation that no precedent seemed to forbid such review.[152] The unstated basis for allowing mandamus appeared to be what the Court perceived as an abuse of discretion or usurpation of power by the lower court in remanding an action on grounds not authorized by statute. No discretion is given the district courts by section 1447(c) and therefore any exercise of discretion by a court in remanding an action not removed "improvidently and without jurisdiction" might arguably constitute an abuse of discretion.[153] The "usurpation of power" theory makes some sense as well because the district court acted in a manner not authorized by statute.

The more interesting facet of *Thermtron Products* is its circumvention of section 1447(d). The dissenting opinion took the position that the language of subsection (d) prohibiting review "on appeal or otherwise" "means what it says."[154] The majority construed subsection (d) to apply to remand orders issued *pursuant to* subsection (c). Thus, the Court indicated, if the trial judge had purported to remand the action on the grounds that it was removed "improvidently and without jurisdiction," whether erroneous or not, the order could not have been reviewed by appeal, by mandamus, or otherwise.[155] In other words, the mere invocation of the statutory grounds by a

150. *Id.* at 340.

151. *Id.* at 341-42.

152. *Id.* at 353.

153. The Court noted that "[l]ower federal courts have uniformly held that cases properly removed . . . may not be remanded for discretionary reasons not authorized by the controlling statute." 423 U.S. at 345 n.9.

154. *Id.* at 354 (Rehnquist, J., dissenting).

155. *Id.* at 343.

district court would make the improper remand of a case unassailable even by mandamus. One might argue that the improper remand of a case for unauthorized reasons is no more in derogation of a defendant's right to remove under section 1441 than is remand purportedly based on statutory grounds but nevertheless erroneous at law. But the majority in *Thermtron Products* apparently disagreed with that notion. Its concern was that a persistent policy by a district court of remanding actions[156] because of a crowded docket, or for any other reason not authorized by section 1447(c), would flagrantly contravene the rights of defendants in that district to remove their cases to federal court pursuant to section 1441. The prevention of a district court's abuse of power under section 1447(c) therefore justified the use of the extraordinary writ.

C. *Discovery Orders*

The review of discovery orders is a broad subject about which generalization is difficult since numerous varieties of orders incorporating matters of both law and discretion might be included under the category of "discovery." Appeals from discovery orders are interlocutory and thus are not appealable as final judgments under section 1291.[157] However, refusal by a party to comply with, for example, an order compelling the production of documents may result in the dismissal of the action or other adverse final judgment, which would then be appealable.[158] Of course, deliberate noncompliance in order to obtain an adverse final judgment is a harsh price to pay for an immediate appeal of the order.

The general federal court prohibition of interlocutory appeals of discovery orders is essential to prevent the use of spurious appeals as dilatory tactics. The Second Circuit has stated that "[i]n a large and complicated lawsuit or series of lawsuits closely related, interlocutory review of such housekeeping matters as discovery would practically preclude termination of the litigation by settlement or trial within the normal lifespan of any of the parties, attorneys, or judges."[159] In some cases, however, unnecessary litigation might be avoided if an early appeal could be obtained. Irreparable harm to a party ordered to produce sensitive documents or to reveal trade secrets may also justify interlocutory review. Under these circumstances, an appeal based on section 1292(b) may be permitted if the action involves one of the rare discovery orders meeting the three requirements of

156. The record showed that respondent district court judge had apparently remanded other cases to state court in similar manner. *Id.* at 341 n.4.

157. Comment, *supra* note 59, at 356.

158. *Id.*

159. American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 284 (2d Cir. 1967).

that section. For example, an interlocutory order directing a newsman to identify his news sources in a libel action was reviewed and affirmed upon an appeal certified under section 1292(b) in *Carey v. Hume*.[160] Other representative types of discovery orders that have been appealed under section 1292(b) include those relating to the disclosure of grand jury testimony in a civil antitrust action,[161] the production of documents,[162] written interrogatories,[163] and the attorney-client privilege.[164] But most interlocutory discovery orders will not fall within the scope of section 1292(b) and the federal courts have preciously guarded against the excessive use of that section so that the policy against piecemeal litigation would not be undermined.[165]

Before *Schlagenhauf v. Holder*[166] was decided by the Supreme Court in 1964, efforts to use mandamus to procure an interlocutory appeal of a discovery order generally failed,[167] although in a few circuits decisions can be found in which the writ was issued.[168] For example, in *Hartley Pen Co. v. United States District Court*,[169] a case involving a breach of warranty claim by Hartley Pen against a producer of ink dye, the defendant used interrogatories to seek disclosure of Hartley Pen's secret formula for its ink. The district court ordered disclosure of the formula, even though Hartley Pen possessed the formula by virtue of an agreement with Formulabs not to disclose its contents. The Court of Appeals for the Ninth Circuit granted an immediate appeal upon petition for mandamus. To the defendant's

160. 492 F.2d 631 (D.C. Cir.), *cert. denied*, 417 U.S. 938 (1974).

161. Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233 (5th Cir. 1963) (controlling question of law was whether district court could order disclosure of grand jury testimony to refresh witnesses' memories).

162. Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963) (whether attorney-client privilege applied to corporation to bar discovery of documents in civil antitrust action).

163. Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203 (7th Cir. 1964) (whether plaintiff public utilities could be required to disclose whether they passed on to consumers alleged overcharges in purchases of equipment from defendants).

164. Duplan Corp. v. Moulinage et Retorderie de Chavanos, 487 F.2d 480 (4th Cir. 1973) (whether upon termination of previous litigation the work product prepared incident thereto loses its qualified immunity); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970) (whether privilege could be asserted by corporation against shareholders in security-law violations action) *cert. denied*, 401 U.S. 974 (1971).

165. 4 MOORE'S ¶ 26.83 [9.2], *supra* note 8, at 612.

166. 379 U.S. 104 (1964).

167. *See e.g.*, Paramount Film Distrib. Corp. v. Civil Center Theatre, Inc., 333 F.2d 358 (10th Cir. 1964) (order requiring production of documents); Pennsylvania R.R. Co. v. Kirkpatrick, 203 F.2d 149 (3d Cir. 1953); Bank Line, Ltd. v. United States, 163 F.2d 133 (2d Cir. 1947) (order requiring production of documents); National Bondholders Corp. v. McClintic, 99 F.2d 595 (4th Cir. 1938) (order staying taking of depositions).

168. *E.g.*, Atlass v. Miner, 265 F.2d 312 (7th Cir. 1959) (order requiring oral deposition in admiralty proceeding), *aff'd.*, 363 U.S. 641 (1960); United States v. United States District Court, 238 F.2d 713 (4th Cir. 1956) (order in criminal antitrust proceeding issuing subpoenas duces tecum), *cert. denied*, 352 U.S. 981 (1957).

169. 287 F.2d 324 (9th Cir. 1961).

contention that an appeal could properly be taken only from a final judgment, the court replied:

> This argument is predicated on the premise that if [defendant] should prevail in the main action and a final judgment be entered by the district court in its favor, the petitioner would have the right to appeal from such final judgment to this Court. If this Court should find the orders complained of clearly erroneous, this Court would reverse the judgment. The premise presupposes a disclosure by petitioner of the trade secrets in compliance with the order of disclosure. Such a victory by petitioner on such appeal would indeed be a Pyrrhic one. Petitioner would have won a battle, but petitioner and Formulabs would have lost the trade secret.[170]

In *Schlagenhauf*, the Supreme Court permitted mandamus review of an alleged usurpation of power by a district court which had ordered the taking of physical and mental examinations of a defendant. The interpretation of rule 35 presented a case of first impression, which the Court regarded as a significant justification for issuing the writ. However, in *Will v. United States*,[171] the Court discounted the significance of the "first impression" aspect of *Schlagenhauf*, and recanted somewhat its approval of an advisory mandamus rationale.[172] The combined impact of *Schlagenhauf* and *Will* has been to create a difference of opinion among the circuits concerning the yalidity of the "first impression" approach.

The Third Circuit rejected a "first impression" argument in *Beal v. Schul*[173] and denied mandamus to petitioners who relied upon *Schlagenhauf*. The Second Circuit also rejected an attempt to invoke *Schlagenhauf* in *American Express Warehousing, Ltd. v. Transamerica Insurance Co.*[174] over the dissent of one judge who noted that the court had an opportunity to resolve the conflicting decisions of the district courts in that circuit. But the "first impression" rationale recently provided the basis for the use of mandamus in *Colonial Times, Inc. v. Gasch*.[175]

The petitioner in *Gasch* brought suit to enjoin the United States Postal Service from interfering with the mailing of an underground newspaper. The district court would not authorize the petitioner's attempts to take depositions of Postal Service employees by tape recording rather than by conventional stenographic means, so mandamus was sought in the Court of Appeals for the District of Columbia. The writ was granted after the appellate court determined that the issue before the court involved "an important aspect of discovery

170. *Id.* at 328-29.

171. 389 U.S. 90 (1967).

172. *See* text accompanying notes 100-102 *supra*.

173. 383 F.2d 401 (3d Cir. 1967).

174. 380 F.2d 277 (2d Cir. 1967).

175. 509 F.2d 517 (D.C. Cir. 1975).

law"[176] and, citing *Schlagenhauf*, that mandamus could resolve an issue of first impression concerning the construction of rule 30(b)(4).[177] Thus, despite the Supreme Court's decision in *Will*, *Schlagenhauf* has apparently expanded, to some extent, mandamus review of discovery orders.[178]

The Court has recently emphasized that mandamus should be reserved for the extraordinary case, however, and that it should be restricted to usurpations of power and abuses of discretion by the lower courts. The plaintiffs in *Kerr v. United States District Court*[179] brought a class action on behalf of all California state prisoners. Seeking injunctive and declaratory relief, plaintiffs alleged constitutional violations in the manner in which the California Adult Authority determined the length of detention for convicted offenders. Plaintiffs sought to compel the production of various documents, including personnel files of the parole authority and random prisoner files. The parole authority claimed that all of the files were irrelevant, confidential, and privileged. It requested that the district court conduct an in camera inspection of all files produced for plaintiffs. The district court ordered the files produced without provision for an in camera inspection, but it did issue a protective order limiting the number of people associated with plaintiffs' counsel who could view the files. The parole authority petitioned for mandamus, which the court of appeals denied. The Supreme Court affirmed unanimously with one justice not participating.

The Court found that the opinion of the court of appeals did not foreclose all possibility that the files could be inspected in camera before disclosure to plaintiffs. The writ had been denied because the parole authority had not asserted its claimed governmental privilege with requisite specificity. In other words, petitioners had available to them "an avenue far short of mandamus to achieve precisely the relief they seek."[180] In reasserting that mandamus should be denied when other adequate remedies exist, the *Kerr* decision may be another signal of the Court's concern that mandamus review, at least of discovery orders, be reserved for the extraordinary case.

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176. *Id.* at 525.

177. FED. R. CIV. P. 30(b)(4).

178. *E.g.*, Heathman v. United States District Court, 503 F.2d 1032 (9th Cir. 1974) (order for production of documents); United States Board of Parole v. Merhige, 487 F.2d 25 (4th Cir. 1973) (order authorizing deposition), *cert. denied*, 417 U.S. 918 (1974); International Business Machines Corp. v. United States, 471 F.2d 507 (2d Cir. 1972) (order requiring production of documents), *overturned en banc on other grounds*, 480 F.2d 293 (1973), *cert. denied*, 416 U.S. 980 (1974); Investment Properties Int'l Ltd. v. IOS, Ltd., 459 F.2d 705 (2d Cir. 1972) (order disallowing deposition); Pfizer, Inc. v. Lord, 456 F.2d 545 (8th Cir. 1972) (attorney-client privilege); *In re* United States, 348 F.2d 624 (1st Cir. 1965) (order permitting depositions).

179. 426 U.S. 394 (1976).

180. *Id.* at 405.

IV. CONCLUSION

The importance of mandamus to the litigants in an action is twofold. First, mandamus may be sought directly from the court of appeals, whereas any appeal under section 1292(b) is dependent upon obtaining the requisite certification from the district court. Second, mandamus may be appropriate to review certain types of orders not appealable under section 1292(b). Section 1292(b) provides exclusively for appeals of questions of law. Mandamus, on the other hand, is designed principally to rectify a district court's usurpation of power or abuse of discretion.

The federal courts of appeals generally have been very conservative in using the writ of mandamus to obtain appellate jurisdiction over interlocutory orders.[181] The writ is still largely confined to "extraordinary" cases. Thus, from a statistical standpoint mandamus review has not had a dramatic impact on federal appellate practice. Nevertheless, mandamus is an important means of circumventing the final judgment rule in those few "extraordinary" cases. Because it is available only when other means of review do not exist,[182] mandamus represents the "safety valve" of federal appealability, the "last resort" remedy by which the appellate courts can exempt an interlocutory order from the final judgment rule.

The petition for mandamus is particularly appropriate for challenging the discretionary decisions of district courts.[183] However, the writ will not issue to control the discretion of the inferior courts, but only to remedy a clear abuse of that discretion.[184] For example, mandamus is appropriate to correct an abuse of discretion by a district court that grants or denies a change of venue without properly considering the relative convenience of the transfer to the parties and witnesses.[185] Moreover, when a district court remands an action to state court for discretionary reasons not authorized by statute, mandamus is appropriate to vacate the remand order.[186]

The Supreme Court has rarely passed judgment on the use of mandamus to review interlocutory orders. In the few cases in which mandamus review has been approved by the Court, the writ was used to further some other goal beyond just the resolution of issues raised in the immediate appeal. In *La Buy v. Howes Leather Co.*,[187]

181. C. WRIGHT, *supra* note 7, at 516.

182. *See* note 75 *supra*.

183. *See* section II.B *supra*.

184. *See* cases cited in note 136 *supra* and accompanying text.

185. *E.g.*, Chicago, Rock Island & Pac. R.R. Co. v. Igoe, 220 F.2d 299 (7th Cir.), *cert. denied*, 350 U.S. 822 (1955). *See* text accompanying note 138 *supra*.

186. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976). *See* text accompanying notes 149-54 *supra*.

187. 226 F.2d 703 (7th Cir. 1955), *aff'd*, 352 U.S. 249 (1957).

for instance, mandamus provided an opportunity for the court of appeals to admonish the district courts of that circuit for their excessive practice of referring cases to masters. The Supreme Court agreed that the references were an "abdication of the judicial function" and held that the immediate review of the reference orders was consonant with the appellate court's authority to exercise "supervisory control" of the district courts.[188] This supervisory power of the courts of appeals also justified the use of mandamus in *Thermtron Products, Inc. v. Hermansdorfer*,[189] in which the Court held the writ to be appropriate to check a district court's apparently frequent practice of remanding actions properly removed to federal court. The Supreme Court also found that a broad goal of the federal court system was served by mandamus review in *Schlagenhauf v. Holder*.[190] The appellate court in *Schlagenhauf* availed itself of the opportunity to resolve a question of first impression involving construction of one of the Federal Rules of Civil Procedure.

The Supreme Court has not, however, intended that mandamus become a carte blanche for the review of interlocutory orders as a matter of course. Even in the *La Buy* decision, often regarded as precedent for broad supervisory mandamus, the Court cautioned: "This is not to say that the conclusion we reach on the facts of this case is intended, or can be used, to authorize the indiscriminate use of prerogative writs as a means of reviewing interlocutory orders."[191] The Court's opinions in *Will v. United States*[192] and *Kerr v. United States District Court*,[193] filled with references to the "extraordinary" nature of mandamus and to the requisite elements of "abuse of discretion" or "usurpation of power," also indicate concern by the Court about an immoderate use of mandamus review. The Court indicated in *Kerr* that mandamus is to be used sparingly so that the federal policy against piecemeal litigation is not disturbed.[194]

The decisions of the Supreme Court in this area are not easily reconciled. The Court at times has approved the liberal use of mandamus review to supervise and advise the district courts as well as to resolve "first impression" issues. But the Court on other occasions has stressed moderation in the use of mandamus and has limited mandamus review to cases in which the record supports a finding of "abuse of discretion" or "usurpation of power."[195]

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188. La Buy v. Howes Leather Co., 352 U.S. 249, 256, 259 (1957).
189. 423 U.S. 336 (1976).
190. 379 U.S. 104 (1964).
191. 352 U.S. at 255.
192. 389 U.S. 90 (1967).
193. 426 U.S. 394 (1976).
194. 426 U.S. at 402-03.
195. Will v. United States, 389 U.S. 90, 95 (1967).

Thus, to some extent, the federal courts of appeals retain wide discretion to determine whether this "extraordinary" remedy is appropriate in each particular case. The decision to permit mandamus review of an interlocutory order must be made with one eye toward the overall benefits to judicial administration gained by review and the other toward the final judgment rule.

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